

NO. 86-636

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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

MARTIN COUNTY and OKEECHOBEE COUNTY,
Florida,

Petitioners,

vs.

ROBERT MAKEMSON,
ROBERT LEE DENNIS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS, ROBERT MAKEMSON
AND ROBERT G. UDELL IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Makemson Case

Respondents, ROBERT MAKEMSON and ROBERT
G. UDELL, accept the statement of the case as set out by
Petitioners in their Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

A wholly independent and adequate state ground supports the Florida Supreme Court ruling, and therefore, the United States Supreme Court should deny the Petition for Writ of Certiorari.

In addition, the Florida Supreme Court ruling is fair to all parties, was a unanimous opinion, and leaves the determination of compensation to court-appointed counsel up to the individual states.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court, in its opinion, relied upon two grounds in holding that Florida Statute 925.036 (1981) was unconstitutional in exceptional circumstance cases, and in also ruling that Florida trial courts have inherent authority to exceed statutory maximum attorney's fees in extraordinary cases.

The first ground was that the statute interfered with an indigent defendant's Sixth Amendment right to effective assistance of counsel, a federal ground; but the Florida Supreme Court also held that the statute was in violation of article V, section 1 and article II, section 3 of the Florida Constitution, a wholly independent and adequate state ground.

Article II, section 3, Florida Constitution reads:

"Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless specifically provided herein."

In ruling that the statute violated article II, section 3, Florida Constitution, the Florida Supreme Court said that the statute was

“unconstitutional when applied in such a manner as to curtail the court’s inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates article v, section 1, and article II, section 3 of the Florida Constitution.” *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986).

As additional support for its holding that the statute violated the Florida Constitution, the Florida Supreme Court referred to an earlier ruling of the Florida Supreme Court. In *Rose v. Palm Beach County*, 361 So.2d 135, (Fla. 1978), the Court held that a statutory maximum on witness fee compensation, if applied in all situations, improperly infringed upon the Court’s authority to carry out its constitutional obligations.

The Florida Supreme Court, by its specific reference to article II, section 3, Florida Constitution, and by its reference to its decision in *Rose v. Palm Beach County*, *supra*, made it very clear that an equal and independent ground for its decision was that Florida Statute 925.036 (1981) was in violation of the Florida Constitution. Because the opinion of the Florida Supreme Court was based upon an independent and adequate state ground, this Court should deny the Petition for Writ of Certiorari. As previously stated by this Court in *Jankovich v. Indiana Toll Road Commission*, 379 US 487, 13 L ed 2d 439, 85 S Ct 493:

"It is undoubtedly 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' Fox Film Corp v. Muller, 296 US 207, 210 [80 L ed 158, 159, 56 S Ct 183]. Cramp v. Board of Public Instruction, 368 US 278, 281, 7 L ed 2d 285, 288, 82 S Ct 275."

As a second basis for denying the Petition for Writ of Certiorari, Respondents, ROBERT MAKEMSON and ROBERT G. UDELL, assert that the opinion of the Florida Supreme Court is a fair result to all parties involved. The statute provides that the attorney is to be compensated at an hourly rate fixed by the Chief Judge of the circuit. Under the Florida Supreme Court ruling, the trial judge is to exercise his discretion on a case-by-case basis, and make a determination as to whether or not the particular case is an extraordinary one which merits a fee in excess of the statutory maximum. Once the trial court has made a determination that a particular case justifies a fee in excess of the statutory maximum, he then makes a determination as to the reasonable number of hours, and then applies the established hourly rate. Through the use of this process, the attorney will receive reasonable compensation for his time and efforts, and the county will not be burdened with an unjust fee.

A third reason for denying the Petition for Writ of Certiorari is that the Florida Supreme court recognized that there had been numerous previous attacks upon the statute and that they could no longer ignore the message that the trial courts were sending to them. The Florida Supreme Court addressed the issue, and in a unanimous decision, ruled that the Florida statute was unconstitutional as applied in exceptional circumstance cases.

As a last ground for denying the Petition for Writ of Certiorari, Respondents, ROBERT MAKEMSON and ROBERT G. UDELL, assert that the procedure for compensating court-appointed counsel should be left up to the individual states. A federal standard on compensation to court-appointed counsel will only cause chaos and confusion, particularly in light of such diverse circumstances as may exist in Dade County, Florida and a small rural county in the midwestern United States. Each state, through its legislature and its courts, who are more closely attuned to the particular problems and needs of their state, should have the right to determine how court-appointed counsel are to be compensated.

CONCLUSION

The Petition for Writ of Certiorari should be denied based upon an independent and adequate state ground supporting the opinion of the Florida Supreme Court.

Respectfully submitted,

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